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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PAUL SIFRE,

Plaintiff,

vs.

WELLS FARGO BANK, C/O TRUSTEE
CORPS,

Defendant.

CASE NO. 3:10-cv-00572-RCJ-VPC

**DEFENDANT WELLS FARGO BANK,
N.A.'S REPLY IN SUPPORT OF ITS
MOTION TO DISMISS PURSUANT TO
FRCP 12(b)**

COMES NOW Defendant WELLS FARGO BANK, N.A. (“Defendant” or “Wells Fargo”), erroneously named herein as Wells Fargo Bank c/o Trustee Corps, by and through its counsel, the law firm of Snell & Wilmer L.L.P., and hereby submits its Reply in Support of its Motion to Dismiss Pursuant to FRCP 12(b).

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 As set forth in Wells Fargo's Motion to Dismiss Pursuant to FRCP 12(b) ("Motion"), of
 5 the purported causes of action that are discernable from Plaintiff's Complaint, all are barred by
 6 the applicable statutes of limitations. Plaintiff's Response to Wells Fargo's Motion fails to
 7 adequately address the statute of limitations, and sets forth many arguments that are wholly
 8 inapplicable to Wells Fargo's Motion. Indeed, Plaintiff's arguments appear to be addressed to a
 9 Motion that is not before the Court, and are entirely irrelevant. Therefore, Plaintiff's claims must
 10 be dismissed, as they are barred by the statutes of limitations, and Plaintiff's arguments in
 11 opposition fail.

12 **II.**

13 **FACTUAL BACKGROUND**

14 Plaintiff purchased real property in Washoe County, Nevada located at 3660 Hawking
 15 Court, Sparks, Nevada 89436, APN 526-051-12 (the "Property") on or about October 26, 2005.
 16 (Grant, Bargain, Sale Deed attached as **Exhibit 1** to the Request for Judicial Notice ("RJN")).
 17 Plaintiff financed the purchase via a promissory note secured by a First Deed of Trust in the
 18 amount of \$338,316.00, dated October 14, 2005 and recorded on October 26, 2005. (First Deed
 19 of Trust, attached as **Exhibit 2** to the RJN). Plaintiff also obtained a line of credit secured by a
 20 Second Deed of Trust in the maximum amount of \$25,000.00, indicating the lender was Wells
 21 Fargo, and the trustee was American Securities Company of Nevada. (See Second Deed of Trust,
 22 attached as **Exhibit 3** to the RJN).

23 Sometime prior to March 2010, Plaintiff stopped making payments on at least the loan
 24 secured by the First Deed of Trust, as indicated by a Notice of Default and Election to Sell under
 25 Deed of Trust recorded on March 3, 2010. (Notice of Default, attached as **Exhibit 4** to the RJN).
 26 As of the date of this Reply, no sale has occurred, and Plaintiff has remained in possession of the
 27 Property without making a payment for over a year.
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1 III.

2 **LEGAL ARGUMENT**

3 **A. Standard of Law for Motion to Dismiss**

4 Plaintiff argues that, as a pro se plaintiff, he is not required to meet the standard for
 5 pleadings set forth by the U.S. Supreme Court in Bell Atlantic Corp. v. Twombly, 550 U.S. 544
 6 (2007) and Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009). (See Plaintiff's Response, p. 21). Plaintiff
 7 does not set forth what standard he seeks this Court to apply, however. Defendant is unaware of
 8 any "different" application of the law that is applicable to pro se plaintiffs. Indeed, Plaintiff
 9 appears to ask this Court to ignore its obligation to apply the law of the land equally to all
 10 litigants.

11 **B. Plaintiff Is Not Entitled to Equitable Tolling of the Statutes of Limitations**

12 Plaintiff argues that the statute of limitations with respect to his fraud claims should be
 13 equitably tolled. Plaintiff does not argue that any of his other claims survive the expiring of the
 14 statutes of limitations due to equitable tolling, but only argues that his fraud claims should
 15 survive. Therefore, Plaintiff's theoretical claims for breach of fiduciary duty, violations of TILA
 16 and RESPA, negligence, breach of the covenant of good faith and fair dealing, and intentional
 17 infliction of emotional distress, should be dismissed because Plaintiff has not opposed Wells
 18 Fargo's argument that such claims are time-barred.

19 Further, Plaintiff is not entitled to benefit from the doctrine of equitable tolling with
 20 respect to his fraud claim(s). Notably, Plaintiff does not cite to any controlling case law in
 21 Nevada, nor in the Ninth Circuit, with respect to the doctrine of equitable tolling. Nevada
 22 recognizes the doctrine of equitable tolling. Copeland v. Desert Inn Hotel, 99 Nev. 823 (1983).
 23 In determining whether the doctrine should apply, the Court may consider the following factors:
 24 "the diligence of the claimant; the claimant's knowledge of the relevant facts; the claimant's
 25 reliance on authoritative statements by the [party] that misled the claimant about the nature of the
 26 claimant's rights; any deception or false assurances on the part of the [defendant] . . .; the
 27 prejudice to the [defendant] that would actually result from delay during the time that the
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1 limitations period is tolled; and any other equitable considerations appropriate in the particular
2 case. Id. at 826.

3 Plaintiff argues that he relied on unspecified representations of (unnamed) defendants, and
4 had no notice of any wrong doing “until the improprieties of the real estate market were finally
5 made public in the popular media.” (Plaintiff’s Response, p. 5). It is unclear when this happened.
6 Plaintiff does not set forth any facts showing that he exercised any reasonable diligence to
7 discover any alleged fraud. It is difficult to evaluate the factors relevant to application of the
8 doctrine of equitable tolling in this case, because Plaintiff fails to specifically allege any
9 misrepresentation or fraud with respect to Wells Fargo, and with respect to Plaintiff’s loan in
10 particular. Instead, Plaintiff purports to allege some general fraud committed by the mortgage
11 industry generally, which, he claims, makes his own loan somehow fraudulent. Plaintiff therefore
12 claims that he was unable to discover fraud with respect to his own mortgage until he heard about
13 the general fraud committed by the mortgage industry as a whole in popular media. This novel
14 theory does not call for application of the doctrine of equitable tolling.

15 Plaintiff does not identify any statements by Wells Fargo that misled him about the nature
16 of his rights, nor does he identify any deception or false assurances on the part of Wells Fargo
17 that prevented him from being able to discover the alleged fraud. Plaintiff has not identified any
18 equitable considerations that call for application of the doctrine of equitable tolling. Therefore,
19 there is no reason for this Court to equitably toll any of the statutes of limitations, and Plaintiff’s
20 claims must be dismissed as time-barred.

21 **Wells Fargo Had No Fiduciary Duty to Plaintiff**

22 Plaintiff argues that the lender was Plaintiff’s agent because Plaintiff paid the lender
23 monies for services. Therefore, Plaintiff claims, the lender had a fiduciary duty to Plaintiff, to act
24 in Plaintiff’s best interest. Plaintiff cites no law for this proposition, and his position is contrary
25 to well settled law that a lender does not owe a fiduciary duty, as “an arms-length lender-
26 borrower relationship is not fiduciary in nature, absent exceptional circumstances.” Yerington
27 Ford, Inc. v. General Motors Acceptance Corp., 359 F. Supp. 2d 1075, 1090 (D.Nev. 2004)
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(overruled on other grounds sub. nom. Giles v. General Motors Acceptance Corp., 494 F.3d 865 (2007)).

Plaintiff's Purported Quiet Title Claim Fails

Plaintiff argues that his quiet title claim is meritorious, but fails to explain how such claim is meritorious. Plaintiff fails to address Wells Fargo's argument that he lacks standing to bring such a claim because he failed to tender payment. However, Plaintiff lacks standing to challenge or stay the foreclosure of the Property through injunctive relief because he failed to tender payments when due and payable. Collins v. Union Fed. Sav. & Loan Ass'n, 662 P.2d 610, 623 (Nev. 1983); FPCI RE-HAB 01 v. E&G Invs., Ltd., 255 Cal. Rptr. 157 (Cal. Ct. App. 1989).

The Remainder of Plaintiff's Arguments Fail

Wells Fargo notes that, in large part, the remainder of the arguments in Plaintiff's Response are wholly inapplicable to Wells Fargo's Motion. Plaintiff argues that his claims were made with specificity and particularity, and again repeats many of the allegations contained in his Complaint. Plaintiff also claims that he properly plead claims for quiet title, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, negligence and negligence per se, fraud, "fraud by non-disclosure," violation of the Truth in Lending Act, intentional infliction of emotional distress.

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IV.

CONCLUSION

Plaintiff commenced this groundless action in an attempt to avoid his contractual obligations under the note and Deed of Trust. However, all of Plaintiff's claims are barred by the applicable statutes of limitations, because they relate to the negotiation and origination of the loan at issue, which occurred in 2005. Because the Complaint fails to state any claims upon which relief can be granted against Wells Fargo, it must be dismissed.

Dated December 23, 2010.

SNELL & WILMER L.L.P.

By: /s/ Cynthia L. Alexander
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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **DEFENDANT WELLS FARGO BANK, N.A.'S MOTION TO DISMISS PURSUANT TO FRCP 12(b)** by the method indicated:

 X U. S. Mail
 U.S. Certified Mail
 Facsimile Transmission
 Federal Express
 Electronic Service via CM/ECF

and addressed to the following:

Paul Sifre
3660 Hawking Court
Sparks, NV 89436
Plaintiff Pro Se

DATED December 23, 2010.

 /s/ Gabriela Resendez
An employee of Snell & Wilmer L.L.P.